Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

ROSEMARY WEISSICH; JILL ELAINE WEISSICH; ELISE MARIE WEISSICH HUDSON; and WILLIAM O. WEISSICH, JR.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. Does the government's failure to warn an individual of a foreseeable danger of murder by federal probationer sufficiently implicate policy concerns so as to fall into the "discretionary function" exception of the Federal Tort Claims Act?

2. Do United States Probation Service ("USPS") guidelines requiring that reasonably foreseeable victims be warned of threats make such warnings a discretionary function when the identical test of "reasonable foreseeability" is imposed on all citizens under state law?

PARTIES

The parties filing this petition are plaintiffs and appellants, Rosemary Weissich, Jill Elaine Weissich, Elise Marie Weissich Hudson and William O. Weissich, Jr. ("the Weissichs"), who are the survivors of a former District Attorney of Marin County, California, William O. Weissich.

The respondent, defendant and appellee below, is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

I.

LOWER COURT OPINIONS.

The opinion of the United States Court of Appeals for the Ninth Circuit is recorded in *Weissich v. United States*, 4 F.3d 810 (9th Cir. 1993). *See* Appendix, p. A-3.

II.

GROUNDS FOR JURISDICTION OF THE SUPREME COURT.

The Court of Appeals issued its opinion in this case on September 10, 1993. Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied on November 4, 1993.

The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE.

1. *Federal Tort Claims Act*, 28 U.S.C. § 2674.

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

2. *Discretionary Function Exception to Federal Tort Claims Act*, 28 U.S.C. § 2680(a).

> "The provisions of this chapter . . . shall not apply to —
>
> > any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused."

IV.

STATEMENT OF THE CASE.

A. Factual Background.[1]

1. *Overview.*

The late William O. Weissich was the elected District Attorney of Marin county, California, located in the San

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[1]The following factual recitation is drawn from the Ninth Circuit's opinion (see Appendix, p. A-3), the factual portions of the trial court's order granting summary judgment (see Appendix, p. A-13) and official

Francisco Bay Area. Mr. Weissich was brutally slain in 1986 by a federal probationer. His assailant, an ex-convict who had been prosecuted by Mr. Weissich, was arrested in 1983 by the Bureau of Alcohol, Tobacco and Firearms ("ATF") as a felon in possession of firearms. Some years earlier, this individual had threatened to kill Mr. Weissich and others connected with his prosecution. This fact was generally known to all concerned at the time of, or shortly after, the 1983 federal arrest. Despite this intelligence, both ATF and the U.S. Probation Service neglected, failed and refused to warn Mr. Weissich of impending danger.

2. *The Perpetrator's Criminal History.*

In 1955, the Marin County District Attorney, William Weissich ("Weissich"), prosecuted Malcolm Schlette ("Schlette"). 9th Cir. Opn., p. A-6. Schlette was convicted of arson and sentenced to twenty years in prison. *Id.* He threatened to retaliate by killing Weissich, the judge, the jurors, the witnesses and the police officers involved in his conviction. *Id.*

In 1966, Schlette was released on state parole. *Id.* Authorities discovered that he planned to carry out his prior threats and returned him to prison to serve the remainder of his twenty year term. *Id.* In 1975 Schlette completed his term and was released without supervision. *Id.*

3. *The Federal Investigation and Prosecution of Schlette.*

In 1983 "particular plans" by Schlette for revenge against Weissich and others prompted Schlette's arrest. Trial Ct. Opn., p. A-15. There is no contention that Weissich ever learned of these particular plans. *Id.*

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documents included in the Excerpts of Record filed by the Weissichs in the Ninth Circuit. These sources shall respectively be referred to as "9th Cir. Opn.," "Trial Ct. Opn." and "ER."

Schlette was arrested by Joseph M. Stafford ("Stafford"), a Special Agent of the ATF. Stafford's report indicates that federal authorities had full knowledge of Schlette's history, including his efforts to obtain weapons after his 1966 release and death threats against those involved in his prosecution. ER 59. Stafford refers to information that **Schlette "told an inmate confidente [sic] that once released he was going to obtain weapons, become proficient in their use, and then carry out his assassination plans."** *Id.* (Emphasis added.) Stafford's report also states that federal agents knew that Schlette was in possession of "confidential home addresses and phone numbers of public officials and witnesses involved in his case" and that Schlette had "reiterated to CDC [California Department of Corrections] officials those persons who he visualized as having lied and conspired to get and keep him in prison — **the D.A.**, his wife, and public officials." ER 59. (Emphasis added.)

ATF learned in early 1983 that in July or August of 1982 Schlette had entered a gun shop in Santa Rosa, California for modification on the rear sight of a rifle. Schlette subsequently returned to purchase "aim-point sighting devices" for that rifle plus a .45 caliber pistol. *Id.* at 60. On January 27, 1983, a raiding party consisting of five ATF agents and two officers from the Sonoma County Sheriff's Office set out to arrest Schlette. *Id.* at 61. Schlette was lured to a local Sheriff's office substation and arrested in the parking lot. *Id.* at 62. A search of Schlette's residence located the rifle, two boxes of ammunition, three "tasers" and other evidence. *Id.* The .45 pistol had been left at the gun shop for modification. *Id.* at 60.

Schlette subsequently pled guilty to a charge of being a felon in possession of firearms and was placed on supervised federal probation for five years. 9th Cir. Opn., p. A-6.

Stafford testified at his deposition that he knew there was a risk to individuals previously threatened by Schlette as a result of his being placed on probation. ER 106.

A report by U.S. Probation Officer Oliver J. Deegan, dated November 22, 1985 noted:

> "Mr. Schlette has a very checkered history and a review of the file is recommended. You will note that his case arises out of the 1955 conviction in Marin County for arson and there were subsequent fears by authorities that Mr. Schlette had targeted participants in his conviction for some kind of harm.... Mr. Schlette had been taking care of his elderly mother, but he reported she died in August 1984 at the age of 94. Now that the mother has died, there should be some more concern about the structure of his life." ER 155.

Officer Deegan noted further that "it might be a good idea to advise the Santa Rosa Police Department of his presence in the area, in view of the nature of this man's prior history.... Consideration should be given to any propensity for arson *or vengeance*, in view of his prior history." (Emphasis added.) ER 155.

4. *Schlette Murders Weissich.*

In 1986, still on federal probation, Schlette travelled to William Weissich's law office, located in San Rafael, California, approximately 35 miles from Schlette's home in Santa Rosa.[2] There, Schlette killed Weissich by shooting him in the head and chest with a .45 caliber handgun equipped with a silencer and laser sighting device. Mr. Weissich had been given no information about or

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[2]The Marin County Superior Court, where Weissich prosecuted Schlette, is also located in San Rafael.

warning of Schlette's 1983 federal arrest, conviction and subsequent probation for possession of firearms. ER 4-5, 40.

Schlette fled the murder scene in a van. When stopped by officers from the San Rafael Police Department, he committed suicide by ingesting poison. *Id.*

B. Procedural History.

The instant Federal Tort Claims Act ("FTCA") action was brought by the wife and three children of William O. Weissich. The action alleged that the ATF and the USPS negligently failed to warn Weissich of the known present threat to his life posed by Schlette and that the USPS negligently supervised Schlette's probation. Federal jurisdiction was based on 28 U.S.C. § 1346(b). ER 3.

California law provides that *there is a duty to warn a potential victim of violent acts by a third party* where there is a "special relationship." *See, e.g., Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 435 (1976); Trial Ct. Opn., A-15. The trial court assumed there was a special relationship between the United States and Schlette after his 1983 arrest. *Id.* It found that was "unclear" if the discretionary function exception to the Federal Tort Claims Act applied and therefore assumed it did not apply. *Id.* at A-14. Nonetheless, the trial court granted the government's motion for summary judgment and dismissed the entire action. *Id.* at A-17.

The Ninth Circuit affirmed. The Court of Appeals' opinion in *Weissich v. United States* is based solely "on the ground that the discretionary function exception of the . . . FTCA bars the Weissichs' suit against the United States." *Id.* at A-6.

V.

ARGUMENT.

A. The Ninth Circuit Improperly Held That The Decision Whether To Warn A Foreseeable Victim Of Violence Implicated Policy Concerns And Hence Fell Within The Discretionary Function Exception To The Federal Tort Claims Act.

The primary goal of the FTCA is to allow tort liability to be asserted against federal actors and agencies on the same basis that it may be asserted against private parties under the common law of the jurisdiction in question. *See, e.g., Richards v. West*, 369 U.S. 1, 6-7 (1962). This is clearly stated at 28 U.S.C. § 2674 which provides:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

There are several statutory exceptions to the Federal Tort Claims Act. The Ninth Circuit found that the discretionary function exception applied in the instant case. This exception provides:

> "The provisions of this chapter . . . shall not apply to . . . any claim . . . based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

This Court has summarized the framework for analyzing the discretionary function exception in *Berkovitz v. United States*, 486 U.S. 531 (1988). In *Berkovitz*, this Court held that "the discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes the course of action for an employee to follow."

Id. at 536. The *Berkovitz* Court also held that, in those instances where a federal statute, regulation or policy does *not* prescribe a course of action, and hence the challenged conduct involved an element of judgment, nonetheless "a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* The Court went on to hold that in those situations in which the challenged conduct involves an element of judgment, the exception

> "protects only governmental actions and decisions based on considerations of public policy. . . . The discretionary function exception insulates the government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Id.* at 537, 539.

Thus, outside of the narrow range of cases where a federal statute, regulation or policy specifically prescribes a course of action the breadth of the discretionary function exception depends on the federal courts' interpretation of "the permissible exercise of policy judgment." An overbroad reading of this language can eviscerate the Federal Tort Claims Act. That is precisely what the Ninth Circuit has done in the instant case.

The Ninth Circuit flatly holds that any decision that concerns warning a victim of potential violence would inherently involve the exercise of policy judgment. The Court of Appeals' analysis is as follows:

> "Here, the Weissichs have identified no federal statute, regulation of policy mandating that ATF officers warn a potential victim. . . . We conclude that the decision whether to warn William Weissich was a matter of discretionary choice for the agency.
>
> "This choice implicated policy concerns. These concerns include how much of the agency's resources it

should commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them. An analysis of these concerns would likely include consideration of budgetary constraints as well as time and personnel limitations.

"It is not necessary for the government to prove a conscious decision based on a policy analysis. . . . It is enough that the choice is one to which a policy analysis may apply. . . . Here, it is. Accordingly, the ATF is shielded by the discretionary function exception of the FTCA from any negligence in failing to warn William Weissich of the danger Schlette posed to him." *Id.* at A-7-8.

This analysis is broad enough to apply to any situation in which a federal agency learns of a foreseeable risk of harm.[3] Indeed, the Ninth Circuit's opinion did not analyze the detailed facts of the case, since they were irrelevant given

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[3]Prior to this Court's decision in *United States v. Varig Airlines*, 467 U.S. 797 (1984), the Ninth Circuit had permitted federal liability for failure to warn. *See United States v. White*, 211 F.2d 79, 82 (9th Cir. 1954). However, in *Begay v. United States*, 768 F.2d 1059 (9th Cir. 1985), the court, citing *Varig*, abandoned its earlier use of the planning level/operational level dichotomy for analyzing the discretionary function exception. *Id.*, 768 F.2d at 1062-1063, n.2. The effect on the duty to warn question was immediate — the *Begay* court held the failure of the U.S. Public Health Service to warn uranium miners of the increasing evidence of radiation danger was a discretionary function. *Id.* at 1065-1066. *See also In Re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 998-999 (9th Cir., 1987) (decision whether to warn participants in atmospheric nuclear weapons tests was discretionary function). *But Cf. Summers v. United States*, 905 F.2d 1212, 1215-1216 (9th Cir. 1990). The rationale of *Summers*, which found that there was no evidence that competing policy considerations were reviewed was rejected *sub silentio* by the portion of the *Weissich* opinion holding that the government need not prove "a conscious decision based on policy analysis." *Id.* at A-8.

the court's broad interpretation of the discretionary function exception.

The Court of Appeals' decision in *Weissich* departs from the analysis of several other circuits. In *Smith v. United States,* 546 F.2d 872 (10th Cir. 1976) the court rejects a similar argument by the government that a decision whether to place warning signs at a dangerous geothermal location in Yellowstone National Park was a discretionary function. The Tenth Circuit found that the decision to designate the location as "undeveloped" was discretionary, but that the duty to warn of danger was not:

> "A policy decision to designate certain areas as 'undeveloped' ones may reasonably entail the omission of boardwalks, trails or footpaths and signs marking such ways. However, it does not follow that the government, as a landowner, is absolved of all duty under state law to erect safety devices or signs cautioning about conditions which have been left undisturbed as a policy matter. . . . If we were to accept the government's broad interpretation of the discretionary exception, it is difficult to perceive which duties under tort law could not be avoided by a similar policy decision to ignore them. . . . Similar decisions to omit warnings or dangerous or hazardous conditions have been held not to come within the exception for discretionary functions. . . . We are convinced that the government's decision, as a landowner, not to warn of the known dangers or to provide safeguards cannot rationally be deemed the exercise of a discretionary function." *Id* . at 877.

In *Dube v. Pittsburgh-Corning,* 870 F.2d 790 (1st Cir. 1989), the court found that the failure to warn "domestic bystanders," i.e., family members, of the danger of exposure to asbestos on the work clothes of employees of a naval shipyard was not protected by the discretionary function exception. The First Circuit based its decision, in part, on

the fact that the government made no policy judgment not to warn the bystanders. It simply failed to warn them. *Id.* at 797. The court also notes, however, that:

> "[B]eyond the lack of a Navy policy judgment, the nature of a putative policy not to warn domestic bystanders is highly speculative. We do not need to enter the policymaking arena to observe that it is difficult to imagine the Navy justifying a decision not to issue a simple warning to domestic bystanders of such potentially devastating danger, based on economic or policy grounds." *Id.* at 800.

The *Weissich* decision conflicts with *Dube*'s holding on the importance of the alleged burden on the agency providing warnings. In *Dube*, the court noted it was "difficult to imagine" justifying a decision not to warn based on economic or other policy grounds. *Id.* at 800. By contrast, in *Weissich*, the court noted that, "an analysis of these factors would likely include consideration of budgetary constraints as well as time and personnel limitations." *Id.* at A-8.

The government may argue that the duty to warn Mr. Weissich of the danger of violence by Mr. Schlette is distinguishable from the duty to warn of geological hazards and asbestos recognized respectively in *Smith*, supra, and *Dube*, supra. This argument does not withstand scrutiny. There was a "special relationship" between Schlette and the federal government. The government knew that Schlette was dangerous and that Weissich was a foreseeable target of attack. In addition, as a result of its 1983 investigation of Schlette, the government knew specific information about the whereabouts of Schlette and his continuing efforts to illegally obtain firearms that could have alerted Weissich to the continuing danger.

Moreover, the Ninth Circuit's opinion makes no fine distinctions. The Ninth Circuit did not find it necessary to

scrutinize the record to determine what the government learned, when it learned it, how difficult it would have been to locate Weissich,[4] or to analyze in detail any policy considerations that might militate against warning him. The court held as a matter of law that budgetary and personnel limitations were involved and that, therefore, the decision whether or not to warn was discretionary. That is an assumption that is unsupported and unsupportable. Obviously, such budgetary and personnel constraints exist in any situation in which the common law imposes a duty to warn.

In *Indian Towing v. United States*, 350 U.S. 61 (1955), this Court held that, while the government did not have an obligation to build a lighthouse, once it had done so, it was subject to tort liability for failing to maintain the lighthouse in working order. The distinction drawn in *Indian Towing* between the discretionary decision whether to undertake an activity and the non-discretionary duty to do so in a non-negligent manner was recognized in *United States v. Gaubert*, 499 U.S. 316, 326 (1991), and *Berkovitz*, supra, 486 U.S. at 538, n.3. The analogy fits here as well. The federal government was under no obligation to investigate, arrest or prosecute Schlette. Having done so, however, it cannot characterize as a "policy decision" its duty under California law to warn Weissich about a foreseeable risk of danger of which the government learned through its investigation of Schlette.

To summarize, the Ninth Circuit's decision effectively eliminates affirmative duties to warn from the FTCA, or at least eliminates such duties arising out of reasonably foreseeable threats of harm from third parties such as Mr. Schlette. Viewed either way, the Ninth Circuit's decision is inconsistent with the law of other circuits and constitutes an

---

[4]Weissich was murdered in his law office in San Rafael, the same small city where he prosecuted Schlette.

unwarranted expansion of the discretionary function exception so as to swallow the rule. Accordingly, the Court should grant certiorari to review this decision.

B. The Ninth Circuit Erred in Holding That Federal Guidelines Requiring Victims to Be Warned Where There Is a "Reasonably Foreseeable" Danger Involved a Discretionary Function.

The Ninth Circuit's opinion treats the liability of the USPS separately from the liability of the ATF. It notes that USPS guidelines imposed a duty on probation officers to warn potential victims of a "reasonably foreseeable" risk. The Court of Appeals holds that "the determination whether a reasonably foreseeable risk exists depends upon a select case-by-case evaluation. A case-by-case evaluation presumes significant officer discretion." *Id.* at A-10. The Ninth Circuit panel then concludes that the determination whether a particular risk was reasonably foreseeable was discretionary. *Id.* at A-11.

The fundamental error in the court's analysis is that foreseeability is a critical element in determining whether there is a duty to warn for *any* party under California law. *See, e.g., Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 439 (1976). *Cf.* California Government Code Section 835 (imposing liability on public entities where, *inter alia*, danger is "reasonably foreseeable"); *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 923 (1980) (negligent party liable to reasonably foreseeable victim of erroneous diagnosis of syphilis); *Dillon v. Legg*, 68 Cal.2d 728, 739 (1968) (general principle of California tort law allowing recovery to those whose injury was reasonably foreseeable). In other words, the law of California imposes on *all* parties, federal and otherwise, a duty to warn where the risk is reasonably foreseeable. The panel's holding converts a mandatory duty into a "discretionary" function solely because the federal guidelines incorporate the common law

standard. This cannot be correct — the net result is that the guidelines, while purporting to adopt principles of common law, actually eviscerate an entire class of tort duties.

Here again, the Ninth Circuit panel allows the tail to wag the dog — it allows an overbroad interpretation of the discretionary function exception to dominate its analysis. By ruling that the decision whether a particular threat is "reasonably foreseeable" is a discretionary function, the Court of Appeals ignores the substantial body of tort law that fixes liability on private parties by the exactly same standard.

C. This Court Should Grant Certiorari in Order to Resolve the Conflict in the Circuits and to Prevent the Ninth Circuit from Eviscerating the Federal Tort Claims Act.

As argued in Section V.A. of this petition, supra, the Ninth Circuit's holding that the decision whether to warn a victim of a foreseeable risk of harm is a discretionary function is in direct conflict with the holdings of other circuits in analogous circumstances. This alone is a sufficient ground for granting certiorari pursuant to Rule 10.1(a) of the Rules of the Supreme Court.

Just as important, the Ninth Circuit's decision effectively nullifies a class of tort duties. As noted in *Allen v. United States*, 527 F.Supp. 476, 479 (D. Utah 1981): "Of the exceptions to the Government's waiver of sovereign immunity under the Federal Tort Claims Act, the discretionary function exception has by far the greatest potential for repeated and varied application. . . . **Read broadly, the discretionary function exception may easily swallow the rule.** . . ." (Emphasis added.) Petitioners submit that that is precisely what will happen if the Ninth Circuit decision remains in force.

Moreover, there is clearly a need for guidance to the lower courts on the application of the discretionary function ex-

ception to situations where tort law imposes an affirmative duty to warn. As noted in *Dube v. Pittsburgh-Corning*, supra: "Rather than a seamless web, however, we found the law in this area to be a patchwork quilt." *Id.*, 870 F.2d at 796. By granting the instant petition, the Court can resolve these uncertainties and assure that the Federal Tort Claims Act is interpreted in a manner that fully recompenses victims of negligence while still protecting the legitimate exercise of policymaking discretion.

VI.

CONCLUSION.

For the foregoing reasons, petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: February 2, 1994

Respectfully submitted,

GOLDSTEIN & PHILLIPS
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APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROSEMARY WEISSICH; JILL ELAINE WEISSICH; ELISE MARIE WEISSICH HUDSON; and WILLIAM O. WEISSICH, JR.,

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APPENDIX

1. Ninth Circuit's Order of November 4, 1993, denying petition for rehearing
2. Ninth Circuit's Opinion in Weissich v. United States of America, 4 F.3d 810 (9th Cir. 1993)
3. District Court's Order of February 3, 1992, denying motions to dismiss and granting summary judgment

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEMARY WEISSICH, JILL ELAINE WEISSICH, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendant-Appellee.

No. 92-15411
D.C. No. CV-88-3853 RHS
ORDER

Before: KOZINSKI, THOMPSON and T.G. NELSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSEMARY WEISSICH, JILL ELAINE WEISSICH, et al.
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA, et al.,
Defendant-Appellee.

No. 92-15411
D.C. No.
CV-88-03583-RHS
OPINION

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, District Judge, Presiding

Argued and Submitted
August 10, 1993—San Francisco, California

Field September 10, 1993

Before: Alex Kozinski, David R. Thompson and
T.G. Nelson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Civil Litigation and Procedure/Immunity

The court of appeals affirmed a judgment of the district court. The court held that the discretionary function exception of the Federal Tort Claims Act barred a suit for negligent failure to supervise a federal probationer and to

warn a person of an impending threat posed by the probationer.

William Weissich was the district attorney who prosecuted Malcolm Schlette for arson in 1955. Schlette was convicted and sentenced to twenty years in state prison. Schlette threatened to kill Weissich and the judge, the jurors, witnesses, and police officers involved in his conviction. He was paroled in 1966, but reincarcerated for the duration of his term when it was discovered that he still planned to cary out his prior threats. He was released without supervision in 1975.

In 1983, Schlette was arrested by the Bureau of Alcohol, Tobacco and Firearms, pleaded guilty to being a felon in possession of a firearm, and was placed on five years probation. In 1986 he shot and killed Weissich. Appellant Rosemary Weissich and her children sued, alleging that ATF and the United States Probation Service negligently failed to warn Weissich of an impending threat from Schlette, and that USPS had negligently supervised him. The district court granted summary judgment for the government and the Weissichs appealed.

[1] There was no federal statute, regulation, or policy mandating that the ATF warn Weissich and the decision whether to do so was a matter of discretionary choice [2] to which a policy analysis involving the allocation of agency resources [3] might apply. Thus, the ATF was shielded from suit.

[4] Likewise, the administrative guidelines pursuant to which USPS might have warned Weissich inherently required the exercise of discretion by officers in balancing the dual obligations to protect the public and to promote the rehabilitation of probationers. [5] Further, the language of the guidelines was suggestive rather than mandatory and a warning was required only when a reasonably foreseeable

risk of harm to a specific third party was believed to exist. [6] Thus, USPS was shielded from the Weissichs' count for failure to warn.

[7] With respect to supervision, federal probation release conditions by their terms implicated discretionary choices by probation officers regarding when and how probationers would be required to report and the grounding of such choices in policy must be presumed. [8] Finally, the establishment of a supervisory plan consistent with the obligations imposed by the USPS guidelines involved policy decisions regarding public safety, allocation of resources, and the likelihood of rehabilitation. [9] Thus, USPS was shielded from the Weissichs' count for negligent supervision.

COUNSEL

Alvin H. Goldstein, Jr., Goldstein & Phillips, San Francisco, California, for the plaintiffs-appellants.

Stephen L. Schirle, Assistant United States Attorney, San Francisco, California for the defendant-appellee.

OPINION

THOMPSON, Circuit Judge:

OVERVIEW

In their complaint filed in the district court, Rosemary Weissich and her three children ("the Weissichs") asserted two claims against the United States. First, they alleged that the Bureau of Alcohol, Tobacco and Firearms ("ATF") and the United States Probation Service ("USPS") negligently failed to warn William Weissich of an impending threat posed by Malcolm Schlette, a federal probationer. Second, they alleged that the USPS negligently supervised Schlette. The district court granted summary judgment in favor of the government on both claims and dismissed the action. The

Weissichs appealed. We affirm. We do so, however, on the ground that the discretionary function exception of the Federal Tort Claims Act ("FTCA") bars the Weissichs' suit against the United States.

FACTS

In 1955, the Marin County District Attorney, William Weissich, prosecuted Malcolm Schlette. Schlette was convicted of arson and sentenced to twenty years in prison. He threatened to retaliate by killing the district attorney, the judge, the jurors, all witnesses, and the police officers involved in his conviction. In 1966, Schlette was released on state parole. Authorities discovered that he planned to carry out his prior threats and returned him to prison to serve the remainder of his twenty-year term. In 1975, Schlette completed his full term and was released without supervision.

In 1983, he was arrested by the ATF. He pleaded guilty to being a felon in possession of firearms and was placed on federal probation for five years. In 1986, while on probation, Schlette shot and killed William Weissich.

DISCUSSION

We review a grant of summary judgment de novo. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 629 (9th Cir. 1987). We may affirm a summary judgment on any ground supported by the record. *Jaffke v. Dunham,* 352 U.S. 280, 281 (1957). A district court's determination of subject matter jurisdiction under the discretionary function exception of the FTCA is reviewed de novo. *Mitchell v. United States,* 787 F.2d 466, 468 (9th Cir. 1986) *cert. denied*, 484 U.S. 856 (1987).

The FTCA authorizes suits against the United States for negligent performance of governmental functions. 28 U.S.C. § 1346(b) (1988). The Act, however, is subject to

certain exceptions. One exception is the discretionary function exception set forth in section 2680(a).

> The provisions of this chapter shall not apply to any claim based on an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise of performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

To determine whether the discretionary function exception applies, we look to the nature of the alleged negligent conduct. *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). All decisions implementing a discretionary decision are not necessarily protected, but only those choices grounded in social, economic and political policy. *Berkovitz v. United States*, 486 U.S. 531, 537 (1988).

[1] The discretionary function exception does not apply when a federal statute, regulation or policy specifically prescribes a course of action for a government employee to follow. *United States v. Gaubert*, 111 S.Ct. 1267, 1277 (1991). In *Gaubert*, the Court concluded that certain agency action was discretionary because there were no formal regulations governing the conduct in question. Here, the Weissichs have identified no federal statute, regulation or policy mandating that ATF officers warn potential victims. Consistent with the analysis in *Gaubert*, we conclude that the decision whether to warn William Weissich was a matter of discretionary choice for the agency.

[2] This choice implicated policy concerns. These concerns include how much of the agency's resources it should

commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them. An analysis of these concerns would likely include consideration of budgetary constraints as well as time and personnel limitations.

[3] It is not necessary for the government to prove a conscious decision based on a policy analysis. *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1028 (9th Cir. 1989). It is enough that the choice is one to which a policy analysis may apply. *Id.* Here, it is. Accordingly, the ATF is shielded by the discretionary function exception of the FTCA from any negligence in failing to warn William Weissich of the danger Schlette posed to him. *See Mitchell v. United States*, 787 F.2d 466, 468 (9th Cir. 1986), *cert. denied*, 484 U.S. 856 (1987) (The FTCA exempts discretionary functions "whether or not the discretion involved be abused.").

The Weissichs contend that the failure to warn was not a matter of choice for the probation officers. They contend that the USPS guidelines impose a mandatory duty on probation officers to warn a foreseeable victim of a risk of harm imposed by probationers. The guidelines provide:

> Probation officers have an obligation to protect the public as well as promote the rehabilitation of the probationer. In meeting these dual obligations, the probation officer has a duty to warn *specific* third parties of a *particular* prospect of harm, *physical* or *financial*, which the officer "reasonably foresees" the probationer may pose to them. The obligation exists whether or not the third party has solicited the information.
>
> (1) The circumstances of all persons under probation supervision should be reviewed periodically to determine whether they might pose a reasonably *foreseeable* danger to a third person. The guidelines apply

to probationers who already have secured employment as well as ones presently seeking employment.

(2) The guidelines are *selective*. A warning is not required in every case, *only* where a *reasonably foreseeable* risk of harm to a *specific* third party is believed to exist.

Determination of Risk. The determination of whether a "reasonably foreseeable" risk exists depends upon a selective case-by-case evaluation. The evaluation should be based upon, among other factors, (1) the probationer's job; (2) his or her prior criminal background and conduct; and (3) the type of crime for which he was convicted. Special attention should be paid to employment or other circumstances which present the probationer with an opportunity or temptation to engage in criminal or antisocial behavior related to his criminal background.

Reasonably Foreseeable Risk. "Reasonably foreseeable" means that the circumstances of the relationship between the probationer and the third party, *e.g.*, employer and employee, suggest that the probationer may engage in a criminal or antisocial manner *similar* or *related* to his past conduct.

Decision Regarding Disclosure.

(1) If the probation officer determines that *no* reasonably foreseeable risk exists, then *no* warning should be given.

(2) If the probation officer determines that a *reasonably foreseeable risk* exists, he or she shall decide, based upon the seriousness of the risk created and the possible jeopardy to the probationer's employment or other aspects of his rehabilitation, whether to: (a) give no warning, but increase the probationer's supervision sufficiently to minimize the risk;

> (b) give no warning, but preclude the probationer from employment; or (c) give a confidential warning to the specific third party sufficient to put the party on notice of the risk imposed.

Guide to Judiciary Policies and Procedures Probation Manual, Vol. X Chapter 4 § 4302 (1983).

[4] If a policy allows room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion. *Berkovitz*, 486 U.S.S. at 546. The probation guidelines require officials to make independent policy judgments. The guidelines set out dual obligations of a probation officer to (1) protect the public, and (2) promote the rehabilitation of the probationer. Because these interests may conflict, officer discretion in balancing them is inherent.

[5] The guidelines provide that the circumstances of probationers "should" be reviewed periodically to determine if they pose a reasonably foreseeable danger to a third person. This language is suggestive, not mandatory. It serves as a general guideline to probation officers. The guidelines also provide that they are "selective." A warning is not required in every case, only where a reasonably foreseeable risk of harm to a specific third party is believed to exist.

The guidelines clearly leave it to the officers' discretion to determine what is a reasonably foreseeable risk of harm to a specific third party. The determination whether a reasonably foreseeable risk exists depends upon a selective case-by-case evaluation. A "case-by-case" evaluation presumes significant officer discretion. The guidelines list several policy factors an officer should consider in determining the risk posed by a probationer and whether a warning is necessary.

[6] We conclude that the USPS, like the ATF, is protected by the discretionary function exception of the FTCA from liability for not warning Weissich about Schlette.

The Weissichs also contend that the USPS negligently supervised Schlette by failing to carry out it's own plan of supervision and failing to enforce the terms of Schlette's probation.

[7] Release conditions for a probationer are set forth in 28 C.F.R. § 2.40 (1992). This section specifically provides that the probationer shall report to his probation officer as the probation officer directs. Thus, when and how a probationer will report implicates a discretionary choice by the probation officer. When a statute, regulation or agency guideline allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. *Gaubert*, 111 S.Ct. at 1277.

[8] In addition, according to USPS guidelines, a probation officer has dual obligations to (1) protect the public, and (2) promote the rehabilitation of the probationer.[5] To meet these dual obligations, a probation officer must establish a supervisory plan which both promotes the rehabilitation of the probationer and causes the least possible harm to the public. This balancing of interests necessarily involves policy decisions on matters such as public safety, allocation of scarce resources, and the likelihood of rehabilitation.

[9] Schlette's probation officers made discretionary choices pertaining to his supervision while he was on federal probation. There was no fixed plan *per se*, but rather an evolving plan, the contours of which were shaped on an ongoing basis as the officers dealt with Schlette. Perhaps the

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[5]Under U.S.C. §§ 3655 and 4203(b)(4) (1988), probation officers function as parole officers.

officers should have decided to supervise Schlette more closely. Perhaps, as the Weissichs suggest, unannounced home visits might have been more appropriate. These are judgment calls, however. They are made by a probation officer in the context of balancing the policy considerations previously mentioned. As such, they are discretionary functions. The discretionary function exception of the FTCA applies, and the USPS is shielded from liability even if it was negligent in supervising Schlette while he was on federal probation.

The district court's dismissal of the Weissichs' action against the government is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROSEMARY WEISSICH, et al.,
Plaintiffs
v.
UNITED STATES OF AMERICA,
Defendant.

C-88-3583 RHS
ORDER

In this civil action, the sole remaining defendant is United States of America (hereinafter, "United States"). Presently under submission, after oral argument, are United States's alternative motions to dismiss and for summary judgment. Each motion is: (a) directed against the entire amended complaint; (b) based on the defenses of lack of subject-matter jurisdiction and failure to state a claim on which relief can be granted; and (c) opposed by plaintiffs.

The action at bar arises out of the tragic November 1986 incident in which William Weissich, plaintiffs' husband and father, was fatally shot with a handgun while he was in his San Rafael law office. The murderer was Malcolm Schlette, who shortly after the murder committed suicide by ingesting poison. From 1955 to 1975 Schlette was incarcerated in the state prison as a result of an arson conviction obtained by Weissich, who was Marin County District Attorney from 1953 to 1960.

In January 1983 Schlette was arrested by United States's Bureau of Alcohol, Tobacco and Firearms. From May 1983 until his death, Schlette was on federal probation, in connection with his plea of guilty to being a felon in possession of firearms.

According to plaintiffs, Weissich's murder: (a) constituted revenge by Schlette for Weissich's obtaining the arson conviction; (b) resulted from United States's negligent failure to warn Weissich of the danger posed to him by Schlette; (c) resulted from United States's negligent supervision of Schlette while he was on probation; and (d) involved United States's negligent violation of the United States Constitution.

The action at bar arises under, and plaintiffs seek damages pursuant to, the Federal Tort Claims Act (hereinafter, "FTCA"). But United States has no FTCA or non-FTCA damages liability based on violation of the United States Constitution. Instead, in the action at bar United States is not liable unless, under similar circumstances, there would be liability under the law of California, the State where United States's alleged wrongdoing occurred [see *Pereira v. USPS*, 942 F.2d 577, 579-580 (9th Cir. 1991); *Rivera v. United States*, 924 F.2d 948, 951 (9th Cir. 1991); *Molsbergen v. United States*, 757 F.2d 1016, 1020 (9th Cir. 1985); *cert. dismissed*, 473 U.S. 934 (1985)].

Furthermore, in the action at bar, United States also is not liable if the discretionary-function exception to FTCA applies here. This exception covers acts that: (a) involve an element of judgment or choice; and (b) are based on considerations of public policy; [see *Woodman v. United States*, 764 F.Supp. 1455, 1462-1463 (M.D. Fla. 1991)].

However, it is unclear if this exception actually applies to any of plaintiffs' causes of action. In the rest of the present order, this Court: (a) assumes that this exception does not so apply; and (b) deals with the issue of whether, under circumstances similar to those in the action at bar, there would be liability under California law.

In general, California law imposes no duty to control another's conduct or to warn those endangered by such

conduct. Exceptions exist where one: (a) voluntarily has assumed a protective duty toward, and has acted on behalf of, the person who later is harmed; (b) has helped, even if only innocently, to create the danger posed to the victim; (c) has a special relationship with the victim; or (d) has a special relationship with the perpetrator [see *Doggett v. United States*, 875 F.2d 684, 689, 694 (9th Cir. 1989); *Molsbergen v. United States*, *supra* at 1021-1025; *Weissich v. County of Marin*, 224 Cal.App.3d 1069, 1076-1077 (1990); *Zepeda v. City of Los Angeles*, 223 Cal.App.3d 232, 234-235 (1990)]. But exceptions (a)-(c) simply do not apply in the action at bar.

As for exception (d), the connection between United States and Schlette constituted a special relationship if the connection was similar to the doctor-patient relationship [see *Doggett v. United States, supra* at 693-694; *Molsbergen v. United States, supra* at 1022]. It is not clear if such similarity existed. But in the rest of the present order it will be assumed that, in the period between the January 1983 arrest and Schlette's death, there was a special relationship between United States and Schlette.

By 1976, though, Weissich already was aware that Schlette intended to take revenge against Weissich [see *Weissich v. County of Marin, supra* at 1073-1074, 1083]. Particular plans by Schlette for revenge against Weissich and others apparently prompted Schlette's January 1983 arrest. It does not appear that Weissich ever learned of these particular plans, but they were ended by the January 1983 arrest. And the firearms associated with these particular plans were taken away from Schlette after the January 1983 arrest.

United States had no duty to warn Weissich based on conduct—statements and acts—by Schlette before the January 1983 arrest. This absence of a duty is based on: (a) Weissich's aforementioned awareness of the danger

from Schlette; (b) the January 1983 arrest's termination of particular plans by Schlette for revenge; and (c) the lack of any special relationship between United States and Schlette before the January 1983 arrest.

Then, too, there is no evidence that, in the period between the January 1983 arrest and Weissich's murder, United States learned of any conduct by Schlette that: (a) actually occurred during this period; and (b) suggested a danger to Weissich specifically.

Plaintiffs contend that United States's failure to learn of such conduct resulted from negligent supervision of Schlette while he was on probation. In determining whether specific alleged negligence is actionable under FTCA, a United States district judge usually must inquire as to whether a private individual would be liable under the relevant State's law. However, private persons do not act as probation officers. Thus, in connection with alleged negligent supervision of Schlette while he was on probation, it must be determined whether California law would make a county probation department liable for negligent supervision of a probationer. Such liability would exist if the county probation department's breach of a mandatory duty found in a statute, a regulation, or some other enactment proximately caused injury to a third party. But such proximate cause would be absent if performance of the mandatory duty would not necessarily have prevented injury to the third party [see *Doggett v. United States, supra* at 689-693]. And adequate, non-negligent supervision of Schlette while he was on probation would not necessarily have prevented Weissich's murder.

In view of what has been said so far in the present order, United States is not liable under FTCA for: (a) any negligent supervision of Schlette while he was on probation; or (b) anything else that allegedly caused Weissich's murder.

This Court hereby: (a) denies the motion to dismiss; (b) bases this denial on United States's having filed an answer to the amended complaint [see F.R.Civ.P., Rule 12(b)]; (c) grants the summary judgment motion; and (d) dismisses the amended complaint and the action at bar.

Dated: 3 February 1992

Robert H. Schnacke
United States District Judge